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EXAMINER

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/718,071
Filing Date: November 21, 2000
Appellant(s): HSU ET AL.

Jason Johnston
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed January 13, 2006 appealing from the Office action mailed on April 12, 2005.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is substantially correct. Applicant correctly states that all the pending claims, including independent claims 1 and 22, were rejected under 35 U.S.C. §103(a) as being unpatentable over to Hammonds et al. (WO 98/03147) in view of to Sebillotte-Arnaud (U.S. 5,728,389) and Potini (U.S. 4,944,938). However, applicant treated this single rejection into two separate rejections, (1) Hammonds in combination with Sebillotte-Arnaud and (2) Hammonds in combination with Potini, stating that the Office considered Sebillotte-Arnaud and Potini as interchangeable references.

Examiner views that the record is clear that the Office Actions have consistently treated the rejection as made in view of Hammonds in view of both Sebillotte-Arnaud and Potini together. Although applicants have now divided the grounds of rejection and presented separate arguments for each part, examiner respectfully submits that the present rejection should be construed according to the record, as initially made by the examiner.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

WO 98/03147	HAMMONDS et al.	01-1998
US 5,728,389	SEBILLOTTE-ARNAUD	03-1998
U.S. 4,944,938	POTINI	07-1990

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1-4, 7-17, 19-22, 24-27, 29, and 44-45 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hammonds et al. (WO 98/03147) in view of Sebillotte-Arnaud (US 5728389), and Potini (US 4944938).

Hammonds teaches wet wipes of fibrous sheet materials that are partially saturated with an aqueous solution comprising 0.5-50 % oat extract and 10-90%

solubilizing agent. See p. 1, line 32 – p. 2, line 26; p. 7, lines 16 – 32. The wipes are used to cleanse and sooth the skin. The aqueous liquid comprises 0.5-10 % of the composition. The solution may be added to the fibrous sheet material at an add-on level of about 0.1-50 %. See instant claims 19-21 and 29. The wipes have a basis weight of 5-200 g/m. See instant claim 22. The oat extract comprises skin protectants and emollients, which conditions the skin. Propylene glycol and sorbitol are disclosed as solubilizing agents. See instant claims 7-10 and 25. The reference teaches, “the aqueous liquid contained within the wet wipes may also include any suitable components which provide the desired wiping properties.” See p. 7, lines 18 – 21. Specifically, emollients, moisturizers, additional surfactants, and preservatives are mentioned. See p. 7, lines 21– 22; instant claims 13 – 17, 26, 27. Towels are taught as another form of the product. The reference also teaches using glycerin to solubilize the oat extract without irritating the skin. While the reference teaches using surfactants, the reference fails to teach alkoxylated surfactants as claimed in the instant claim.

Sebillotte-Arnaud teaches that talloweth-60 myristyl glycol is a conventionally used nonionic surfactant in skin cleansing compositions. See Example 3.

Potini teaches that talloweth-60 myristyl glycol is a conventional water-soluble thickener well known in cosmetic art. See col. 2, lines 60-64. See instant claims 11, 12, 44, and 45.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to have added the talloweth-60 myristyl glycol to the lotion composition of Hammonds as motivated by Sebillotte-Arnaud and Potini because 1)

Hammonds teaches to include suitable cosmetic ingredients such as additional surfactants in the aqueous liquid to provide the desired wiping properties; 2) Sebillotte-Arnaud teaches that talloweth-60 myristyl glycol is an old and well known nonionic surfactant used in a skin cleanser; 3) Potini teaches that talloweth-60 myristyl glycol is also used as a water-soluble thickener in cosmetic art. The skilled artisan would have had a reasonable expectation of successfully producing a skin care composition with enhanced viscosity to make the wet wipe of Hammonds.

(10) Response to Argument

The issue in this case is whether it would have been obvious for a skilled artisan in cosmetic/pharmaceutical art to add the alkoxylated alcohol surfactant/thickener (talloweth-60 myristyl glycol) of Sebillotte-Arnaud and Potini to the lotion composition of Hammonds to make the claimed wet-wipe product. Examiner takes the position that the motivation to make the present invention stems from Hammonds, which teaches adding cleansing surfactants to the skin care composition, and Sebillotte-Arnaud, which teaches that the alkoxylated alcohol surfactant is useful as a skin cleansing agent. Potini was cited to show that the thickening property of the surfactant as recited in the independent claims, claims 1 and 22, is well known in the art.

Examiner also notes, as discussed above, that both of the secondary references, Sebillotte-Arnaud and Potini are concurrently applied to make the present rejection, rather than as interchangeable references as the way applicants have presented in the brief.

A. Hammonds does not teach away from the limitations of claims 1 and 22.

Applicants assert that Hammonds teaches using a solubilizing agent in its oat extract solution which “thins” the solution, while applicants are adding a viscosity increasing component to make the lotion better sustained on the surface of the paper product.

In response, examiner notes that the use of a solvent to solubilize an active agent does not teach or suggest, either expressly or implicitly, that the final lotion composition must be kept in a thin viscosity. It is evident from the teaching in the reference that the solubilizing agent is selected not for the purpose of thinning the solution but to stabilize the solution containing the oat extract.

Applicants’ argument that Hammonds teaches away from adding any viscosity-enhancing agent is unpersuasive because, the reference in fact teaches to further incorporate other additives surfactants, and there is no specific mention of excluding any component that affects the viscosity of the composition. It is also noted there is no teaching in the reference that other conventional ingredients used in Hammonds are exclusively used to make a wet-wipe products, but rather, widely used in pharmaceutical/cosmetic products in general. For example, the glycols and surfactants that are used in Hammonds are also used in Sebillotte-Arnaud. See Hammonds, 4, line 30 – p. 5, line 3; Sebillotte-Arnaud, Examples 1 and 3.

B. Combination of Hammonds and Sebillotte-Arnaud is properly made, as both references are directed to pharmaceutical/cosmetic products.

While applicants state that the disclosure of Hammonds is limited to adding an oat extract solution a preservative and water, the statement incorrectly describes the

teaching of the reference. See Brief, p. 14, lines 8-9. As taught by the reference and indicated in the rejection, Hammonds in fact teaches adding surfactants as well. See Hammonds, p. 7, lines 21– 22. Also given the teaching of Sebillotte-Arnaud that the alkoxylated alcohol surfactant, talloweth-60 myristyl glycol, is useful as a cleansing surfactant, a skilled artisan would have found a motivation to add this cleansing surfactant to make a cleansing composition for wet-wipes. Thus, applicants' argument that the surfactant in Sebillotte-Arnaud cannot be combined with the Hammonds composition solely because the former fails to teach wet-wipe products is not persuasive.

In response to applicants' arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See In re Keller, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); In re Merck & Co., 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). In this case, while applicants enlist the differences between Hammonds and Sebillotte-Arnaud, there is no evidence or argument that would negate the motivation to use talloweth-60 myristyl glycol which fits the purpose of the Hammonds invention. The skilled artisan would have been motivated to add this surfactant to make a stable and cleansing composition that can be dipped, sprayed, or painted on a paper substrate.

Applicants emphasize that the Sebillotte-Arnaud invention is a "solid, marshmallow-like skin cleansing composition" and thus the surfactant used there is not suitable to make the wiping products of Hammonds. Examiner respectfully points out that the outstanding rejection in this case does not require incorporating the entire

composition of the Sebillotte-Arnaud patent into the lotion composition of Hammonds. The rejection is based on the specific teaching that the particular surfactant used in the present invention is well known in pharmaceutical, cosmetic and personal care art. Examiner takes the position that the fact that this surfactant is used in a solid-containing composition as in Sebillotte-Arnaud would not have deterred the skilled artisan from employing the surfactant in the liquid composition of Hammonds because the solid materials of the Sebillotte-Arnaud invention are formed by a structuring agent and not by this surfactant. The surfactant there is used specifically for its cleansing property.

Applicants also assert that the rejection improperly picks and chooses components from each reference without considering the references as a whole. The argument is unpersuasive because the rejection has specifically addressed that the motivation to select applicant's surfactant is due to the known cleansing property, as taught by Sebillotte-Arnaud.

C. One of ordinary skill in the art would have been motivated to make the claimed invention in view of the collective teachings of Hammonds, Sebillotte-Arnaud, and Potini.

Applicants also argue, by highlighting the differences of Hammonds and Potini, that there is no motivation to combine these references. The arguments are not persuasive because applicants do not address the specific motivation to combine the references that was cited by the examiner. Specifically, applicants' argument that the antiperspirant/deodorant gel of Potini cannot be incorporated into the paper materials of Hammonds does not address the ground of the present rejection. The specific

motivation to employ applicants' alkoxylated alcohol surfactant is found in Sebillotte-Arnaud, while Potini further teaches that this surfactant also has viscosity-enhancing property.

Applicants also assert that adding the component that is used in an antiperspirant/deodorant gel is not expected to improve the wiping property of the Hammonds' invention. Again, applicants' argument here does not take into consideration that the present rejection is made in view of the combined teachings of Hammonds, Sebillotte-Arnaud, and Potini. The cleansing property of the surfactant is taught by Sebillotte-Arnaud. Potini is used to show that the surfactant that applicants' have used in the invention has the thickening property as recited in the claims.

Applicants also assert that any motivation to combine 'either secondary reference' with the teachings of Hammonds improperly stems from the present application. In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See In re McLaughlin, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). In this case, all the evidence which is used as the basis of the present rejection has been found in the objective teachings of the references. No improper hindsight was employed to make the present rejection.

In conclusion, a skilled artisan would have found a motivation to add the alkoxylated alcohol cleansing surfactant of Sebillotte-Arnaud to make a cleansing and wiping composition that is applied to the paper substrates of Hammonds. The thickening property of the surfactant is a physical property that has been well known in the art, according to Potini. It is the examiner's position that the claimed invention is viewed prima facie obvious in view of the collective teachings of these references.

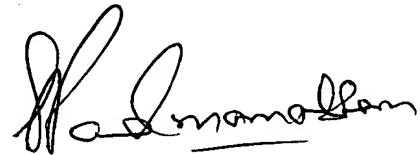
For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

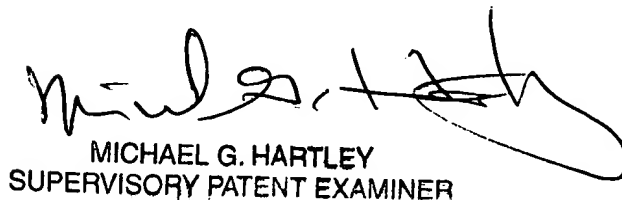
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